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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

No. 339.

GROSS INCOME TAX DIVISION, STATE OF INDIANA,
Petitioner,

vs.

R. CARL QUICK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

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RESPONDENT'S BRIEF IN OPPOSITION TO GRANTING WRIT OF CERTIORARI.

The Respondent R. Carl Quick, for his brief in opposition to the granting of a writ of certiorari directed to the Supreme Court of Indiana, respectfully shows that the judgment of said Court was rendered in this cause on the 29th day of April, 1948, affirming the judgment of the Circuit Court for the Forty-first Judicial District of Indiana, after which the petitioner herein filed with the Supreme Court of Indiana its petition for rehearing, which was overruled by said Supreme Court of Indiana on the 25th day of June, 1948.

OPINION BELOW.

Petitioner has made appropriate reference to the opinion of the Indiana Supreme Court, which appears in the printed record (page 33; original record, page 66) and Respondent will not repeat it here.

JURISDICTION.

Title 28, U. S. C., Sections 1257 and 2101, are the governing statutes for the purposes of jurisdiction, if assumed by this Court.

PETITIONER'S REASONS FOR REQUESTING WRIT.

Petitioner is in error in stating the cause is one which draws in question the validity of a statute of the State of Indiana on the ground that such statute is repugnant to the Constitution of the United States, particularly Article 1, Section 8. The Indiana Statute (commonly known as Gross Income Tax Act) expressly exempts from taxation receipts derived from Interstate Commerce.

Section 6, Chapter 50, Acts Indiana General Assembly 1933, as amended;
Section 64-2606 (a), Burns' Ann. Stat. 1933 (1943 Replacement, Supplement 1947);
Appendix A, this brief, page 19.

The question litigated in the Courts below involved the unlawful attempt by the Gross Income Tax Division of the State of Indiana to levy and collect a gross receipts tax under the Indiana Gross Income Tax Act on Respondent's constantly recurring sales of live stock in out of state public stockyards, during the year 1940, found to be in fact Interstate Commerce, which Indiana was prohibited from taxing under the terms of its own statute by reason or Article 1, Section 8 of the Constitution of the United States. Respondent asserts this question has been determined heretofore by this Court and the decision of the Indiana Supreme Court is in full accord with the applicable decisions of this Court.

PETITIONER'S STATEMENT AS TO QUESTIONS PRESENTED.

Neither the record nor the facts disclosed by the record in this case, in any sense, justify such questions as petitioner attempts to propound to the Court under this heading.

A. This question fails to take into consideration the essential elements of Respondent's method and manner of business and the course of the transactions involved in the case at bar, as are clearly set forth in the opinion of the Indiana Supreme Court (R. p. 66, Printed R., p. 33).

B. No attempt is made by the Indiana Supreme Court to extend the prohibition against the tax on the broad grounds suggested by petitioner in this question.

> "We are constrained to hold that **the sale** of the cattle and hogs at the stockyards was but **the ultimate end of the livestock insofar as this appellee** (Respondent here) **was concerned,** and that the transportation **and sale** were both a part of the movement of the same into and through the stream of interstate commerce." (Parenthetical insertion and emphasis ours.)
>
> Opinion Indiana Supreme Court, 78 N. E. (2d) (1948) 871, 873, Advance Sheets.

C. The Indiana Statute (Burns' Ann. Stat. 1933, 1943 Replacement, and 1947 Sup. Vol. 11, Sec. 64-2601 et seq.), known as the Gross Income Tax Act, makes no provision in the levy of gross income tax for apportionment in respect of transactions occurring in more than one state. Therefore, the ipse dixit of the taxing authorities made without sanction of legislative authority cannot sustain the tax in this case as an apportioned tax. It is elementary that such authorities cannot set up their own standards in this respect.

See:

J. D. Adams Mfg. Co. v. Storen (1938), 304 U. S. 307, 82 L. Ed. 1365, 1369;

Freeman v. Hewit (1945), 329 U. S. 249, 91 L. Ed. 265, 271 (note practice of brokers in deducting commissions and expenses in remitting proceeds of sales);

Gwinn, White & Prince v. Henneford (1939), 305 U. S. 424, 83 L. Ed. 272, 276.

AS TO PETITIONER'S SUMMARY STATEMENT.

In the petitioner's summary statement it appears that it has persisted in its error when it attempts to briefly outline the factual situation both as reflected by the complaint and the evidence.

For a fair, unbiased and disinterested summary of the facts we respectfully refer the Court to the opinion of the Indiana Supreme Court appearing in the record at page 66, printed record, p. 33, and in the unofficial report in the 78 N. E. (2d) page 871 of West's Reporter System.

The evidence given in the cause upon the trial in the original Court below appears in the record beginning at page 30, printed record, p. 11.

Respondent agrees with petitioner that the same Gross Income Tax Act of Indiana has been under consideration in this Court prior to this time, and respectfully submits that the Indiana Supreme Court has made no new application of principles heretofore announced by this Court, nor has it in any way decided a Federal question of substance in any way not in accord with the applicable decisions of this Court.

SUMMARY OF ARGUMENT.

The petition presents but two questions:

(a) Have the questions decided by the Supreme Court of Indiana been heretofore decided by this Court, and, if so,

(b) Were they decided in accord with the decisions of this Court?

I. The receipts which petitioner sought to tax have been decided by this court to be receipts from interstate sales.

II. Petitioner's contention that sales of out of state shipments of livestock by commission men in the stockyards are not sales in interstate commerce, because the shipper had no order prior to their shipment, is without support in reason or authority.

III. Petitioner's summary statement is misleading and inaccurate.

IV. The sales being a part and incident of interstate commerce, the proceeds thereof are not subject to the Indiana Gross Income Tax.

V. There was no apportionment.

ARGUMENT.

The petition is without merit, and the writ should be denied.

The propositions set forth under the headings in the petition "The Reasons for Requesting Writ," "Questions Presented," and "Reasons for Granting Writ" present, in fact, but two questions. These questions are those tendered by numbers I and II under the heading "Reasons for Granting Writ," it being thereby contended that the questions decided by the Supreme Court of Indiana have not been heretofore determined by this court and that such questions have not been determined in accord with the applicable decisions of this court. If the questions under consideration have, in fact, been heretofore determined by this court, it is not necessary that the same questions be again settled, as contended in reason IV, and, if such questions have been determined by the Supreme Court of Indiana in accord with the applicable decisions of this court, it follows as a matter of course that it has determined such questions correctly and not in a way that is untenable as contended in reason III.

I.

That the very receipts, which the petitioner here sought to tax, are the proceeds of sales effected in interstate commerce has been squarely decided by this court in Swift and Company v. United States (1905), 196 U. S. 375, 49 L. Ed. 518, and Stafford v. Wallace (1922), 258 U. S. 495, 66 L. Ed. 735. It is the petitioner's theory that when respondent's cattle and hogs were sold by commission men, to whom he had consigned them in the stockyards in Chicago, Cleveland, Cincinnati, and Buffalo, these transactions constituted local sales in those respective states. It in-

sists that interstate commerce had terminated, that the livestock had come to rest, and that the sales were in all respects separate and distinct from the transportation of the livestock from one state into another and did not partake of its character. In the Swift case this court was called upon to determine whether or not sales of livestock, made in the very manner in which the sales here under consideration were made and in the very yards where these sales were effected, constituted interstate commerce within the meaning of the federal constitution. It was there said by Mr. Justice Holmes in language quoted by the Supreme Court of Indiana in its opinion:

> "When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce."

The soundness of this court's conclusions in the Swift case was challenged in Stafford v. Wallace, where it was again contended, as petitioner contends here, that livestock, shipped to commission men in the stockyards, there came to rest and that sales made by these commission men in the stockyards were to be separated from the interstate transportation of the livestock which were the subject of the sales and were purely local transactions. In an opinion by Mr. Chief Justice Taft this court adhered to the conclusions arrived at in the Swift case and said:

> "The principles of the Swift case have become a fixed rule of this court in the construction and application of the commerce clause."

It was further said:

> "The stockyards are not a place of rest or final destination. Thousands of head of livestock arrive daily by carloads and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the West to the East, and from one state to another. Such transactions cannot be separated from the movement to which they contribute, and necessarily take on its character. The commission men are essential in making the sales without which the flow of the current could be obstructed, and this, whether they are made to packers or dealers. The dealers are essential to the sales to the stock farmers and feeders. The sales are not, in this aspect, merely local transactions. They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity. The origin of the live stock is in the West; its ultimate destination, known to, and intended by, all engaged in the business, is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well-understood course of business. The stockyards and the sales are necessary factors in the middle of this current of commerce."

In view of the language of this court which we have quoted, spoken with respect to transactions identical with those here under consideration, petitioner's contention that the question as to whether or not the sales of respondent's livestock were made in interstate commerce has not been

heretofore determined by this court is wholly without merit. Of course, its contention that respondent's livestock had come to rest in the stockyards and that the sales which were there made were local transactions which were in no sense a part of interstate commerce is equally untenable.

II.

The petitioner contends that if the respondent had had prior orders for the sale of his livestock the proceeds derived therefrom would be immune from the Indiana gross income tax, but that, in the absence of such prior orders, interstate commerce was not involved in the sales. It is true that in the Adams and Freeman cases orders for the sale of the machinery and securities respectively there involved had been obtained prior to their shipment from Indiana, although, as to Freeman, it does not appear that he knew, or was concerned with, the identity of those who were to purchase his securities on the stock exchange. As was said by the Supreme Court of Indiana in the instant case, however, there is nothing in the Adams case (and there was nothing in the Freeman case) that would in any way limit interstate commerce to cases where prior orders are used. That a sale by a commission man in the stockyards is not rendered a local transaction by reason of the absence of an order for such sale prior to the shipment of the livestock from another state, of course, clearly appears from the Swift and Stafford cases. There is not a word in any opinion of this court to support the distinction, which petitioner attempts to draw, to the effect that a sale of a commodity shipped from one state into another pursuant to a prior order constitutes interstate commerce while a sale made upon the arrival at a stockyards or stock exchange of livestock or securities shipped there for sale from without the state constitutes a purely local transaction. It will be noted that in Gwinn, White &

Prince v. Henneford, 305 U. S. 434, 83 L. Ed. 272, the gross receipts derived by the appellant from the marketing of fruit shipped from Washington to places of sale in other states and foreign countries was held not subject to the gross receipts tax of the State of Washington, without regard to whether the fruit was shipped directly by the growers to the purchasers or consigned to the appellant at extra-state points from which it was diverted by appellant to purchasers who bought the fruit while in transit or where it was stored pending sale.

The precise distinction which the petitioner seeks to draw was advanced and rejected by this court in McGoldrick v. Berwind-White Coal Mining Company, 309 U. S. 33, 84 L. Ed. 565, 575, where it is said:

> "Respondent, pointing to the course of its business and to its contracts which contemplate the shipment of the coal interstate upon orders of the New York customers, insists that a distinction is to be taken between a tax laid on sales made, without previous contract, after the merchandise had crossed the state boundary, and sales, the contracts for which when made contemplate or require the transportation of merchandise interstate to the taxing state . . . But we think this distinction is without the support of reason or authority."

It is apparently the theory of the petitioner that, notwithstanding these expressions of this court, should, for instance, a dog fancier agree upon the sale of a dog to a purchaser in another state, and, pursuant to such agreement, cause the animal to be transported to the purchaser and receive in due course the proceeds of the sale, the transaction would be an interstate one, for which the commerce clause would have a particular and jealous concern, and the proceeds of which would be immune from

taxation by the seller's state; but that the great current of transportation of cattle from the ranges of the west to the stockyards in the terminal markets, their sale in those markets to feeders in the corn belt; the transportation of cattle and hogs back from the farms to the market and their sale in those markets to packers and shippers, all conducted through the medium of commission men and dealers, according to the long and well established usage, result in no sales in interstate commerce, but in local transactions, the proceeds of which the states of the sellers may tax without limit and at will. Consideration should be given to the object sought to be attained and the mischief sought to be prevented by the commerce clause of the constitution. We apprehend that no such distinction as is here sought to be drawn existed in the minds of those who framed the constitution, but that, conscious of the diversified interests of the original states, they sought to prohibit any state from obstructing the free flow of raw materials from the states where they were produced to the states which were prepared to transform them into manufactured articles, of manufactured goods from the industrial states to agricultural areas and of grain and livestock from those sections which produced them in abundance to those states which, even then, were dependent on their neighbors for that which they consumed. Bearing in mind the words of Mr. Chief Justice Marshall quoted in Home Building & Loan Association v. Blaisdell, 200 U. S. 398, 443, 78 L. Ed. 413, 431, "We must never forget that it is a **constitution** we are expounding—a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs," and to the language of Mr. Justice Holmes in the Swift case, quoted by Mr. Chief Justice Taft in the Stafford case—"Commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business," and giving heed to the highly complex economic

system which exists today, it is manifest that the current of livestock flowing in its accustomed way from range and farm into and through these federally regulated stockyards, and supplying from day to day the very life blood of the nation, is a current of interstate commerce, which, at least as much as any other commercial intercourse, is not subject to obstruction or interference by the states.

III.

We are constrained to suggest that petitioner's summary statement is inaccurate and misleading, and its representation as to the facts is in many respects unsupported by the evidence. It attempts to limit the respondent's business activities to those of a mere farmer, while in Paragraph 1 of the stipulation it appears that he is engaged, not only in the business of farming, but in dealing in and the raising and selling of livestock, and in Paragraph 5 it appears that in the year in controversy he made 136 separate shipments of livestock aggregating in value $220,268.14. He shipped no other "farm produce." Petitioner recites that the livestock were transported with "no buyer in sight," that they were "received and held at the destination with the title still in respondent, subject to the control, use, or disposition of taxpayer and/or his agents" and that the sale "occurred at a subsequent time and after an elapsed interval, during which buyers were sought and offers solicited." This is an attempt to make commerce a purely "technical legal conception" and not a "practical one, drawn from the course of business." Buyers are always present at the stockyards. Indeed, the identity of the particular purchaser of livestock at these great terminal yards is of no consequence. So far as the current of commerce is concerned, cattle and hogs are shipped, not primarily to any individual buyer nor even to any particular commission man. They are shipped to a livestock market, existing and subject to regulation pursuant to the

laws of Congress, and the commission men are but an instrumentality of that market which affords the conduit through which the current of livestock flows from the ranges to the feed lots and from the feed lots to the packers. The respondent's livestock were not "held" in the stockyards except, as was said in the Swift case, for "the interruption necessary to find a purchaser at the stockyards," and, in view of the typical and constantly recurring course of respondent's business the flow of his shipments and sales was a current of commerce among the states, and the purchase of his cattle was a part and incident of the interstate commerce.

It cannot accurately be said that respondent's livestock were sold at a "subsequent time" or "after an elapsed interval." They moved into the yards, and through the pens and into the possession of the purchaser in a continuous flow, to which any "elapsed interval" was a mere incident. The suggestion on page 7 of petitioner's brief that respondent, after "depositing" his stock in an out of state market, "there elected" to make the sales which produced the income sought to be taxed finds no support in the record. The election to make the sales was made, not in the yards, but prior to the time when the livestock were loaded into cars or trucks. They were shipped to market for one purpose, and for one purpose only, and that was for the purpose of sale in the markets which were maintained to absorb them. Whether or not the respondent would have had the technical right to dispose of his livestock other than by sale in the stockyards after they had there arrived is of no consequence. He shipped them to market for the purpose of sale on the market. That purpose was never altered in any of the 136 separate transactions which gave rise to the receipts which the petitioner seeks to tax. The transactions were typical of transactions in the yards and were constantly recurring,

and any speculation as to what he might have done, but never did, does not affect the interstate character of these transactions.

IV.

It is, of course, true that the Swift and Stafford cases, holding that sales in all respects identical with the sales, the receipts from which are here sought to be taxed, are not local transactions, but are a part and incident of interstate commerce, do not decide the further question as to whether or not the tax here sought to be imposed is a burden upon such commerce. We recognize that those cases involved respectively the application of the Sherman Anti-Trust Act to practices there under consideration and the validity of the Packers and Stockyards Act of 1921. The court was called upon to decide, however, whether sales, such as were made by the respondent in the instant case, constituted interstate commerce and the affirmative answer of the court to that question settled the character of the transactions here under consideration. Interstate commerce is interstate commerce whether the question arises in connection with a determination of the regulatory power of Congress or in connection with the validity of a tax sought to be imposed by a state.

It being settled by the Swift and Stafford cases that the receipts which the petitioner seeks to tax were derived from sales in interstate commerce, it necessarily follows from the decisions of this court in J. D. Adams Manufacturing Company v. Storen et al., 304 U. S. 307, 82 L. Ed. 1365, and Freeman v. Hewitt, 329 U. S. 249, 91 L. Ed. 265, that the tax in question, being a tax imposed by the state of the seller on the proceeds of interstate sales, violates the commerce clause and cannot be enforced.

We shall not prolong our discussion by a reference to the many cases cited by the petitioner which have to do

with taxes imposed by states other than Indiana, under laws far different from the Indiana gross income tax, and upon transactions very different from those here involved. This court, having declared invalid a tax imposed by Indiana on interstate sales, the question is settled and what has been decided with respect to other taxes, levied by other states, under other laws, and upon other transactions is quite beside the point. We should perhaps mention, however, the case of Minnesota v. Blasius (1933), 290 U. S. 1, 78 L. Ed. 131, which happens to involve a property tax on livestock while they were in the possession of their owner in the stockyards in South St. Paul. The case does not sustain the respondent's contention. Blasius had purchased the cattle in the stockyards from commission men to whom they had been consigned from other states. They were confined in pens which he had leased from the stockyards company, and he was offering them for sale on the day on which property was assessed for taxation in Minnesota. In holding that these cattle were subject to the property tax, this court said:

> "The original shipment was not suspended; it was ended. That shipment was to the South St. Paul stockyards for sale on that market. That transportation had ceased and the cattle were sold on that market to Blasius, who became absolute owner and was free to deal with them as he liked—they were not in transit. Their situs was in Minnesota where they had come to rest."

The tax there upheld was not imposed upon the receipts from the sale of the cattle, nor was it imposed by the state from which they had been shipped. It was an ordinary property tax assessed against their owner after the cattle had not only arrived in the stockyards, but had been there sold. It has no application to the instant case. As is held in the Swift and Stafford cases, respondent's

cattle had not ended their transit until after their sale, and they were not at rest while in the custody of the commission men during the interval between their arrival at the yards and their sale to the purchasers.

V.

The petitioner finally contends, as we understand its argument, that by reason of the fact that transportation, sale, and yardage charges were deducted from the price which the purchasers paid for the livestock and only the balance remitted to respondent, there was such an apportionment of the tax as prevented it from offending the commerce clause of the constitution. In the first place, the argument does violence to the facts. The transportation charges were not uniformly deducted, because, with respect to shipments made by truck, the same were either made by respondent in his own truck or transportation charges were paid by him (Printed Record, 14, 15). This argument, of course, concedes that the sales were interstate sales, but takes the position that no part of the proceeds thereof, which was actually received by the respondent, accrued to him by reason of such sale, but resulted solely from activities within the State of Indiana, and that there has consequently been some kind of forced "apportionment." Of course, the statute makes no provision for apportionment. Even if it had, and such an apportionment had, in fact, been made, we are not clear that, in view of the construction placed upon the majority opinion in the Freeman case by Mr. Justice Rutledge in his concurring opinion, such facts would have rendered the tax a valid one. However, there is not only no provision in the law for an apportionment, but there was not in fact any apportionment at all. Petitioner's argument is manifestly absurd. Otherwise Indiana could tax at will the entire proceeds of every sale of commodities shipped by its citi-

zens across its borders save and except only that portion of the same which was consumed in selling and transportation costs. The J. D. Adams Manufacturing Company would have been liable for the tax on the proceeds of its out-of state sales, save only that portion of such proceeds which was applied to freight charges and the cost of selling. Freeman would have been liable for a tax upon the entire proceeds derived from the sale of his securities, save only that proportion of the same which was consumed by charges for postage and brokers' commissions.

We submit, in conclusion, that the questions sought to be presented are not open questions, but settled questions; that under the authority of the Swift and Stafford cases the respondent's sales were interstate sales and that under the authority of the Adams and Freeman cases the proceeds therefrom derived are not subject to the tax sought to be imposed upon them. The judgment of the Supreme Court of Indiana was in all respects in accord with these ruling precedents of this Honorable Court, and the writ should be denied.

Respectfully submitted,

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APPENDIX A.

Indiana Gross Income Tax Act—Section 6 (a).

Exemptions.

There shall be excepted from gross income tax under this act:

"(a) So much of such gross income as is derived from business involved in commerce between this state and other states of the United States, or between this state and foreign countries, but only to the extent to which the State of Indiana is prohibited from taxing such gross income by the Constitution of the United States of America • • •".

Acts of Indiana General Assembly, 1933, Chapter 50, Section 6;
Acts of 1937, Chapter 117, Section 6;
Acts of 1943, Chapter 144, Section 2;
Acts of 1945, Chapter 143, Section 2;
Burns' Annotated Statutes, 1933, Replacement 1943, Supplement 1947, Section 64-2606.